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In the

Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION; ALLEN D. BROWN; DENNIS H. DAUGS; GREG HAYES; and L. DIAN MAXWELL,

Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON; KATRIN E. FRANK, in her official capacity as President of the Legal Foundation of Washington; and GERRY L. ALEXANDER, BOBBE J. BRIDGE, THOMAS CHAMBERS, FAITH IRELAND, CHARLES W. JOHNSON, BARBARA A. MADSEN, SUSAN OWENS, and CHARLES Z. SMITH, in their official capacities as Justices of the Supreme Court of Washington,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does compensation for taking of private property depend solely on whether the owner has been deprived of economic value, or are other elements of the property interest, such as use, control, disposition and the right to exclude, also compensable when categorically appropriated by government?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Amicus files this brief to assist in the consideration of important constitutional issues of property rights. Pacific Legal Foundation (PLF) is a nonprofit organization headquartered in Sacramento, California, with an institutional commitment to a robust enforcement of the Fifth Amendment.

For more than two decades PLF attorneys have been championing property rights in court. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case, Petition for certiorari (Petition), at 2-7.

SUMMARY OF ARGUMENT

In examining Washington State's Interest on Lawyer Trust Accounts (IOLTA) program, the court below wrongly ruled that Petitioners would not be entitled to compensation even if they could show that seizure of their IOLTA-generated interest was a taking; the court based this assertion in part on the contention that any economic element seized would be speculative and conditional in value. Yet the core property interests that have been confiscated go beyond mere economic value; they include freedom to possess, use, and dispose of property, all of which this Court has found compensable when appropriated by government.

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

The court below wrongly refused to apply per se scrutiny to a program whereby government takes to itself control and disposition of private property, and uses it, potentially, for ideological purposes that the property owner might not support and has no say in choosing—in short, a classic per se taking.

The court below inappropriately applies ad hoc analysis used for regulatory takings to a clear per se seizure. Yet even under ad hoc scrutiny, the seizure of clients' IOLTA-generated interest imposes a taking because its impact is one of economic confiscation; it violates the clients' legitimate expectations that funds designated by this Court as their property would be subject to their disposition and control; the nature of the governmental action is analogous to a physical invasion of private property; and the purpose served by the program is a broad social aim that should be funded by society as a whole rather than an arbitrarily chosen minority. For all these reasons, the decision of the court below should be reversed.

ARGUMENT

I

THE RULING BELOW FLOUTS THIS COURT'S TEACHING THAT THE CORE AND COMPENSABLE ELEMENTS OF PRIVATE PROPERTY ARE NOT CONFINED TO ITS MERE ECONOMIC VALUE

The Fifth Amendment prohibits uncompensated taking of private property. Yet is some private property not covered? Is there a type of legitimately owned private property that can be confiscated by government—i.e., that can be appropriated for government use and disposition in a way understood by the courts to be a taking—and yet no compensation would be due under the Fifth Amendment? As the dissent below notes (*Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 852 (9th Cir. 2002) (Kozinski, J., dissenting)), no cases answer yes; none holds that there is a

species of private property that stands outside the protection of the Takings Clause. Or rather, there is no such case prior to the majority en banc decision below. The ruling talks of property "for which no compensation is due" even when it "has been taken," *id.* at 851. The ruling offers the accrued interest in this case as an example. The majority bases its claim that Petitioners are not owed compensation even if a taking of their property were established, on the observation that Petitioners would not have the property in question—i.e, the accrued interest—if government had not created the interest-generating program in the first place. *Id.* at 852. According to the appellate court, Petitioners seek to be compensated "not for the value of what they lost, but for the value of what the [interest-generating program] has created." *Id.* at 862.

But this mischaracterizes what they are seeking and what they are owed. The Washington IOLTA program requires attorneys to deposit client funds that are nominal in amount into a pooled account whose interest is confiscated by the state in order to fund various legal-services programs. Petition, Statement of the Case, at 2-6. Petitioners do not seek to be compensated merely for any economic value confiscated from them, but for other, nonmonetary but equally fundamental components of their property interest that have been seized or destroyed. Even though the economic harm to Petitioners from IOLTA's confiscation might be debatable, they have also been deprived of the exercise of an essential bundle of rights. The core property rights that have been confiscated are those that this Court identified in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), as the essence of property ownership: freedom to possess, use, and dispose of property, and the right to exclude. In *Lorctto*, the fact that the property's economic value actually might have been enhanced by the taking did not forestall compensation, because these other foundational rights had been subverted. Significantly, this Court relied on *Loretto* in finding that IOLTA-generated

interest is private property: "We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value." *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169 (1998) (citing *Loretto*, 458 U.S. at 437). "While the interest income at issue here may have no economically realizable value to its owner, possession, control and disposition are nonetheless *valuable rights* that inhere in the property." *Phillips*, 524 U.S. at 170 (emphasis added).

In the case at hand, those very rights have been nullified. The right to exclude is denied, as Petitioners are not allowed to prevent a government-designated agency from laying hands on their accrued interest. Likewise, Petitioners are not given a voice in how that interest is to be spent, or by whom; the power to use and dispose of their property is assumed by the state and state-designated authorities. For the appellate court to suggest that because a property interest might have only a debatable economic value, therefore it embodies no "valuable rights" that are compensable if taken, is to flout *Loretto* and *Phillips*, both of which recognize core property rights and interests beyond mere economic value.

This teaching—that mere economic value is not the only property interest to be considered in the takings equation—is implicit in *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). In *Webbs*, this Court found that the confiscation of accrued interest in a manner remarkably similar to the one at bar, amounted to a compensable taking. *Webb's* found unconstitutional a court's refusal to distribute to clients interest from their deposits held in a court registry. *Id.* at 164. Compensation was appropriate even though claimants—as with the Petitioners here—earned the interest only because of the nature of the government registry, a fact that undermines the rationale of the appellate court for declaring that compensation would not be appropriate in the case at bar.

While there are indeed cases involving government destruction of the value of private property where compensation has *not* been found appropriate, this is because no taking was found in the first place. For instance, in *United States v. Caltex*, 344 U.S. 149, 163 (1952), oil companies whose facilities were destroyed by the Army in anticipation of an enemy advance during wartime were not owed compensation under the Fifth Amendment, because these destructions were part of the "ravage and burden of war," not deliberative takings whereby property was "appropriated for subsequent use."

Likewise, in *United States v. Central Eureka Mining Co.* the War Production Board's closing of nonessential gold mines was not compensable under the Fifth Amendment, *because no taking was found*; a prohibition on operating the mines—to preserve scarce equipment in the mines—was not a "taking" because a "taking" would have required that the government "occupy, use, or . . . take possession" of the mines, which it did not. 357 U.S. 155, 166 (1958).

Significantly, what the War Production Board did not do in *Central Eureka*, the IOLTA program at bar *does* do—i.e., it *takes possession* of and *uses* Petitioners' accrued interest. In other words, the IOLTA program appropriates powers that *Loretto* says are core elements of the property interest and are therefore compensable if seized. Because the ruling below contradicts this Court's teaching that the compensable elements of the property interest are not confined to a property's mere economic value, this Court should reverse.

II

THE RULING BELOW FLOUTS THIS COURT'S TEACHING BY INSULATING FROM PER SE ANALYSIS A CLEARLY CATEGORICAL TAKING—I.E., ONE WHERE GOVERNMENT APPROPRIATES USE AND DISPOSITION OF PRIVATE PROPERTY

The appellate court, 271 F.3d at 856, refuses to apply per se taking analysis to a confiscation of a type of bank-account interest that this court, *Phillips*, 524 U.S. at 169, has identified as private property. The appellate court's rationale is grounded in an untenable, arbitrary distinction between money and real property. According to the appellate court, ad hoc, not per se, analysis is appropriate where money is alleged to have been taken, because money is "fungible." 271 F.3d at 854 (quoting *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989)). But *Sperry* is an inapposite precedent. As this Court noted in *Phillips*, 524 U.S. at 171, *Sperry* deals only with the question of what analysis should be applied to *fees* for services. Further, even if money is fungible with other money, takings practice recognizes money as a substitute—and instrument for reiumbursement—when nonmonetary property is seized. There is thus a problem of logic and semantics in suggesting that money is categorically and conceptually distinct from other forms of property.

The suggestion that money is a sui generis form of property not deserving of full Fifth Amendment protection, conflicts with this Court's ruling in *Webb's*. In finding that government confiscation of private parties' accrued interest amounted to a compensable taking, this Court, 449 U.S. at 164, analogized to *United States v. Causby, 328 U.S. 256 (1946)*. *Causby* is a physical invasions case, as this Court acknowledged in *Loretto*, 458 U.S. at 437. In other words, far from insisting that allegations of money takings be given ad hoc

analysis, this Court found that appropriation of accrued money interest in *Webb's* worked a categorical taking.

The essence of a per se taking is present when property is actually taken and used by government. *Washington Legal Foundation*, 271 F.3d at 865-66 (Kozinski, J., dissenting); *Central Eureka*, 357 U.S. at 166; *Caltex*, 344 U.S. at 163. There is a "'classic taking' . . . [when] the government directly appropriates private property for its own use.' " *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1480 (2002) (citation omitted). Such a "classic taking" is imposed by IOLTA. This is illustrated by considering factors that also point to the First Amendment violation known as compelled speech. Although First Amendment questions are not directly at issue in this case at this point, the fact that IOLTA has compelled clients to fund organizations that have pursued policy advocacy that clients might not agree with, also shows how IOLTA works a "classic taking." Essential rights of possession, control and disposition have been appropriated by government and by the agencies that government has designated to disburse funds seized from clients.

Controversial initiatives by organizations that have received IOLTA funds in Washington State have included: litigating to expand bilingual education advanced by Evergreen Legal Services (*see Bilingual Education Advocates Win Small Victory in Lawsuit*, Ethnic News Watch, Int'l Exam'r, Aug. 2, 1994, *available at* http://www.lexis.com/research/retrieve/frames?_m=6cd43c9e192979b11f8c5c13d5405f80&csvc=bl&cform=bool&_fmtstr=VKWIC&docnum=1&_startdoc=1&wchp=dGLbVlb-lSllA&_md5=1d48c44c67b50e6c68365ae4153ede98); suing the state Apple Commission for allegedly falsely "luring" migrant farm workers to the area with allegedly distorted radio ads (*see Rights of Farm Workers*, Seattle Post-Intelligencer, June 4, 1995, http://www.lexis.com/research/retrieve/frames?_m=b879eb5

9345c9e7e7085f5dba696bfd6&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=3ec34f7c77e16ee3ed30d49ffa62fbea; and challenging alleged jail crowding (*see* Mize, Jeff, *Gridlock at Lockup*, The Columbian, Jan. 18, 1998, http://www.lexis.com/research/retrieve/frames?_m=cc9b7bebf86684bca0ae197898e9263a&csvc=fr&cform=free&_fmtstr=XCITE&docnum=1&_startdoc=1&wchp=dGLbVtb-lSllz&_md5=6ebf3087f57253538832412bcc0e3ad4). Although these might be worthy causes in many people's estimation, they are nevertheless *policy* pursuits that do not enjoy universal support. Forcing private property owners to pay for policy agendas—without regard for whether the property owners support or oppose the particular policy pursuits—is not just arguably a First Amendment violation, it is the very definition of government appropriation of the beneficial use of private property—i.e., a per se taking.

Indeed, not only are Petitioners themselves denied a say in how their property is used, but even the general public is deprived of a voice in appropriation of money seized by government. The program is accountable neither to the property's owners, nor even the voters whom government is suppose to serve and represent. *See* McMorris, Frances A., *Ruling May Undermine Programs That Fund Legal Services for Poor*, Wall St. J., Sept. 30, 1996, at B12 (noting comment of lawyer challenging constitutionality of IOLTAs that such programs "do an end-run around state legislatures").

This undermining of other rights that results from an initial undermining of property rights, illustrates a truth articulated by Justice Stewart:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. . . . [A] fundamental

> interdependence exists between the personal right to liberty and the personal right in property.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

Because the court below proposes a doctrine that would insulate obvious per se takings from per se analysis, this Court should reverse.

III

EVEN UNDER AD HOC REVIEW, IOLTA WORKS AN ILLEGAL TAKING

This Court opined in *Tahoe-Sierra*, 122 S. Ct. at 1479, that it is "inappropriate" to apply a test from the sphere of regulatory takings to a categorical taking. But even if the IOLTA categorical taking was judged by the "essentially ad hoc, factual inquiries" articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), IOLTA still should be found to work a taking. The first of the three *Penn Central* factors—the "economic impact of the regulation on the claimant" (*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986))—applies here in a straightforward manner. "Since the Court has already determined . . . that the client has a property interest in IOLTA generated interest, any 'taking' of that property would surely seem to have an economic impact on the client." Hrina, David J., *The Future of IOLTA: Has the Death Knell Been Sounded for Mandatory IOLTA Programs?*, 32 Akron L. Rev. 301, 321 (1999) (citation omitted). What of the counter argument that the amount a client might receive from a pooled trust account is speculative? This contention, whatever its merits, is defeated by the fact that *any* interest generated is recognized by this Court as belonging to the client; the possibility that the client might lack direct access to it shouldn't allow government to confiscate its use and disposition without reimbursement.

"Similarly, it would be difficult to assert that a client cannot satisfy the second of the *Penn Central* factors, that of a 'distinct investment backed expectation.'" *Id.* (citation omitted). Again, because this Court has declared that a client owns IOLTA-generated interest, this Court itself has created an investment-backed expectation that the client would not be deprived of use and disposition. *Id.* Surely any client who knows that money held in trust is capable of earning interest would expect that the interest be paid to him, or at least that it not be arbitrarily seized to support political or ideological groups with which he might not agree. *Id.*

Finally, *Penn Central*, 438 U.S. at 124, requires an analysis of the "character of the governmental action." Infringements are more commonly found to be takings under this prong when they "can be characterized as a physical invasion by government." *Id.* This fact is significant because, as noted above, *Webb's* analogized a taking very much like the one at bar in *Causby*, and *Causby* "is . . . a quintessential physical occupation case, a fact . . . later recognized in *Loretto*." Breemer, J. David, *IOLTA in the New Millenium: Slowly Sinking Under the Weight of the Takings Clause*, 23 U. Haw. L. Rev. 221, 240 (2000).

In any case, this Court has also found that "public program[s] adjusting the benefits and burdens of economic life to promote the common good" can "nonetheless effect a taking." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998). IOLTA confiscates a client's property to serve what government has determined to be broad social purposes promoted by legal service agencies. But the presumed benefit in this arrangement is outweighed by its conflict with a basic Fifth Amendment principle: government should be prevented "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). There is clear injustice in compelling a "dispersed political

minority" to shoulder such a broad public obligation. *See generally* Douglas, Kevin H., Note, *IOLTAS Unmasked: Legal Aid Programs' Funding Results in Taking of Client's Property*, 50 Vand. L. Rev. 1297, 1333 (1997) (accusing IOLTA programs of "quietly confiscating property from a dispersed political minority").

However inappropriate an ad hoc analysis might be in the context of the per se taking worked by IOLTA, even by ad hoc analysis, the seizure of IOLTA-generated interest should be seen as a taking. Therefore, this Court should reverse the ruling below.

CONCLUSION

Because the IOLTA program imposes a categorical taking that appropriates valuable core elements of the property right—principally dominion, use, disposition, and the right to exclude—Amicus respectfully requests this Court to grant Petitioners' request that the decision below be reversed.

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Respectfully submitted,

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